KHOO IH CHU

v.

JEREMY CHONG HOE SIONG

HIGH COURT, SINGAPORE
CHAO HICK TIN JC
[SUIT NO. 1462 OF 1987]
30 AUGUST 1989

TORT: *Damages - Personal injuries - Plaintiff surgeon injured thumb - Slower rate of work - Plaintiff to earn less under partnership agreement - Loss of earnings - Loss of future earnings - Cost of future operations.*

The plaintiff, a dental surgeon aged 39, was a passenger in a motor vehicle driven by the defendant when it collided with a lorry parked by the side of the road.

The plaintiff suffered injuries to his wrist and left thumb with the result that he suffered permanent pain, weakness and restriction of motion of the left thumb. The injury affected the rate and nature of the work of the plaintiff.

The plaintiff practiced in a partnership with 2 others and his capacity to work had been reduced with the result that there was a drop in the net profit of the firm. Under a new partnership agreement, the plaintiff was to earn less because of the reduction of his earning capacity.

Interlocutory judgment was entered against the defendant with damages to be assessed by the Registrar. The Assistant Registrar awarded the plaintiff the following:

General damages	
Pain and suffering	$5,000
Costs of future operation	$6,000
Loss of future earnings	$108,000
Special damages	
Agreed	$7,019
Loss of earnings	$12,880
($230 per day x 56 days) Total:	$148,899

The Assistant Registrar also awarded interest of 6% on the award for pain and suffering and on the award of special damages.

The defendant appealed against the whole decision of the Assistant Registrar.

Held:

[1] Award for pain and suffering was reduced to $12,000.

[2] Award for the cost of future operations was reduced to $4,000 - After taking into account inflation, rising costs and antecedent pain, this was fair and adequate payment as the payment would be made in advance.

[3] Award for loss of future earnings was upheld.

- Where plaintiff's injuries result in a slower rate of work, this is an existing loss which amounts to a pecuniary loss which cannot be compensated by an award of interest.

[4] Award for loss of earnings was upheld.

(a) The defendant was not entitled to insist that the plaintiff exercise his contractual rights against a 3rd party so that defendant will have to pay a lesser amount.

(b) The sum awarded as loss per day was a net amount as tax liability on the gross income had been deducted.

Cases referred to:
Browning v. The War Office [1963] 1 QB 750
Ong Jin Choon v. Lim Hin Hock [1988] 3 MLJ 137
Moeliker v. Reyrolle & Co. [1977] 1 WLR 132
Underwood v. Ong Ah Long [1986] 2 MLJ 246

For the plaintiff - K.K. Tang
For the defendant - Benedict Chan

JUDGMENT

Chao Hick Tin JC:

This was an action for damages for injuries suffered by the plaintiff on account of a motor accident. The plaintiff was on 6 March 1986 at 10.15 p.m. a passenger in motor vehicle, EE 4667, which was being driven by the defendant along Cornwall Garden when it collided into motor lorry, YB 5299, which was parked by the side of the said road. Interlocutory judgment was on 21 September 1987 entered against the defendant, with damages to be assessed by the Registrar.

At an assessment held on 19 November 1988 the Assistant Registrar awarded the plaintiff a total sum of $148,899 as damages, made up as follows:

General damages

Pain & suffering	$15,000
Cost of future operation (with antecedent pain)	$6,000
Loss of future earnings	$108,000
Special damages	
(i) agreed	$7,019
(ii) Loss of earnings ($230 per day for 56 days)	$12,880
Total	$148,899

The Assistant Registrar also awarded interest at 6% on the $15,000 for pain and suffering and on the $19,899 for special damages from the date of the issue of the writ to the date of judgment.

The defendant appealed against the whole decision of the Assistant Registrar. I heard the appeal and reduced the amount for pain and suffering from $15,000 to $12,000 and the amount for the cost of future operation from $6,000 to $4,000. However, I maintained the amounts

awarded by the Assistant Registrar for loss of earnings and loss of future earnings. No argument was made by Counsel for the defendant against that part of the order of the Assistant Registrar relating to interest. The defendant has now appealed to the Court of Appeal against those two items plus the item on the cost of future operations.

Injuries Suffered

The plaintiff, who was aged 39 on the date of assessment, is a dental surgeon by occupation. As a result of the accident, he suffered the following injuries:

(i) open and crushed wound of the interphalangeal joints of the left thumb;

(ii) complete division of the exterior pollicis longus tendon; and

(iii) laceration over the ulnar aspect of the front left wrist.

The plaintiff was operated upon for the injuries and was hospitalized for 5 days. He was away from work for 56 days. The injuries on the left thumb had since healed. The residue disabilities were described in these terms by Dr. Chang Wei Chun, orthopedic and trauma surgeon, in his report of 27 June 1988:

> He complained of pain and stiffness of the interphalangeal joint of his left thumb. He was unable to put any protracted pressure on the thumb. This affected his occupation as a dental surgeon as he was unable to hold any instruments between the thumb and index for long. At times he would get spasms of pain in the interphalangeal joint causing him to drop the instrument he was holding.
>
> He also complained of weakness of this left middle, ring and little fingers.
>
> Clinically the interphalangeal joint of the left thumb was painful to pressure. Flexion was restricted from 0 to 30 degrees compared to 80 degrees on the right side. The left middle, ring and little fingers were weak resulting in weakness of opposition between the thumb and fingers.
>
> Radiologically there was established degenerative osteoarthritic changes of the interphalangeal joint of the left thumb.
>
> ***Conclusion:***
>
> The abovenamed had severely injured the interphalangeal joint of his left thumb in this accident. Osteoarthritis had set in and he had permanent pain, weakness and restriction of motion of the joint. If his symptoms worsen he may require an arthrodesis of this joint.
>
> The weakness of his left middle, ring and little fingers is due to an old neuropraxic injury to his ulnar-nerve when he sustained his laceration on the wrist. This will not improve at this point of time.

In his evidence before the Assistant Registrar, Dr. Chang said:

> Osteoarthritis has set in. It will continue to deteriorate - the interphalangeal joint of the left thumb. As it degenerates, the pain will become more and more severe. Purely based on estimation, I feel it would be 5 years before the patient suffers loss of use of the thumb. If the patient feels sufficiently pain(ful), he could go for an operation to convert the painful stiff joint to painless stiff joint.

Dr. Chang estimated that at the time of the assessment, taking into account the condition of the thumb and the weakness in the three fingers, the plaintiff had a permanent incapacity of 30% of the left hand, with 20% attributable to the thumb and 10% to the three fingers. In five years time as the thumb deteriorated, the permanent incapacity would increase by 10% to 40%.

The plaintiff in his evidence stated that he still suffered pain in his thumb. He was not able to move his thumb - loss of flexion. In his work he had to use two hands. When he did extractions or fillings and had to bend his thumb, he could hear "the bones cracking." In his dental practice, 1/3 of his work involved operation, 1/3 bridging and 1/3 general dentistry. He could not carry on at the pace he used to. When the pain got severe, he had to stop. He could not do two extractions continuously. He could not do more than one operation a day.

The plaintiff practised in partnership with two others in a dental surgery. The evidence was quite clear that his capacity to work had been reduced. He could not see and treat as many patients as he could before. The difference in the net profit which the firm earned in 1985 and 1986 was the sum of $20,000. The plaintiff explained that the net profit of the firm did not drop significantly because his partners worked harder and did not go on leave. But that could not go on forever. Moreover, from February 1989, and because of the plaintiff's injury, the partners would be having a new arrangement. Under this new arrangement, it was likely that he would be earning less as income division would be tied up with earning capacity. The plaintiff said that before the accident his average daily gross collection was $1,000 a day.

Loss of Earnings

As stated above, for loss of earnings the Assistant Registrar assessed the amount at $230 per day for 56 days making a total of $12,880. This amount would appear to be based on a computation set out in the defendant Counsel's written submission. The plaintiff's income tax assessment for 1987 showed that he earned $86,223 in 1986. The tax payable was $11,948. His net income was therefore $74,275 which worked out (taking into account the 56 days he was on medical leave and not paid) to be $7,185 per month and approximately $230 a day.

The defendant attacked this item on two grounds:

(i) by his partnership arrangement, the plaintiff was entitled to draw from the firm notwithstanding his being out of work on account of the injuries. The plaintiff has on his own volition waived his rights and thus could not claim against the defendant for the loss; and

(ii) the amount awarded failed to take into account the tax which the plaintiff would be liable to bear.

The evidence of the plaintiff relating to this item was as follows:

Q: Between time of accident and today, your share of the partnership has not changed?

A: No. It is according to contract but for the 2 months on medical leave, I forfeit my pay.

Q: Although under the contract, the same amount was due?

A: Yes - the same percentage.

From the above, it did not appear entirely clear to me whether the plaintiff was saying that he was entitled to the two months pay but gave it up voluntarily or that he forfeited it because of his absence and thus was not entitled to it. In the context, his answer to the second question quoted above seemed to relate more to the fact that from the date of the accident to the date of the assessment his share in the partnership remained the same.

In any event, even assuming that it was the plaintiff who on his own volition did not wish to insist on his rights and draw his share of the income from the partnership, I did not think that that should preclude the plaintiff from claiming the income loss as damages from the defendant. Indeed until quite recently, the rule had been that "the damages to be awarded to a physically injured plaintiff for the loss of his earning capacity were to be reduced because part of his loss had been or would be recouped by reason of benefit conferred upon him by third parties with whom the defendant had nothing to do": see *McGregor on Damages* (14th Edn.) at para. 1116. Inroads began to appear in the no-deduction rule in respect of, *inter alia*, payments to the plaintiff by way of salary. As Lord Denning stated in *Browning v. The War Office* [1863] 1 QB 750:

> ... the injured person must, I think, give credit for any sums which he **receives as of right** in consequence of his injury. Take wages, for instance, that his employer pays him during his incapacity, being under an obligation to do so. The typical case is the policeman who is entitled to his full wages whilst disabled. **He gets them from his employer and he cannot claim the self-same wages again from the wrongdoer. He cannot be allowed to get them twice over**. He must give credit for the wages he **received and is entitled to receive**. (emphasis added).

The cases established that a plaintiff, who has been paid his wages, should not be allowed to claim his wages, all over again, against a defendant tortfeasor. But I did not see the cases as having established a rule that a defendant tortfeasor was entitled to insist that a plaintiff exercised his contractual rights in order to reduce the damage which the defendant-tortfeasor was obliged to pay under general law.The defendant referred to the case *Ong Jin Choon v. Lim Hin Hock* [1988] 3 MLJ 137 as authority for the proposition that a plaintiff who was entitled to be paid his wages suffered no loss. I think the decision in *Ong Jin Choon* must be viewed in the context. There the plaintiff was in fact paid by his companies in which he was a director. Nevertheless, the Court there held that as the payments were made by the companies on their own volition and **not as a matter of contractual obligation**, no credit should be given for the payments received by the plaintiff in assessing his loss of earnings. I did not see *Ong Jin Choon* as an authority for the proposition that a defendant was entitled to take advantage of the contractual rights of a plaintiff against a third party so as to reduce the damages payable by the defendant even though the plaintiff had decided not to claim those contractual rights.

It must be remembered that in a situation like the present it is the defendant who is responsible for the injuries. It is one thing to say that a plaintiff should not be paid twice over; it is another to say that a defendant is entitled to insist that a plaintiff must exercise his contractual rights against a third party in order to enable the defendant to enjoy the benefit of having to pay a lesser amount of damages. Take the example of an employee who is injured and is hospitalized and his term of employment provides that his employer shall bear his hospitalization expenses, whatever be the cause. I do not see any rule which precludes the employee for whatever reasons paying the hospital bill himself and claiming what he has paid against the tortfeasor. For these reasons I did not think there was any merit in the first objection.

As regards the second objection, the sum $230 adopted as the loss per day was already a net amount. It would be recalled that the tax liability of $11,948 was deducted from the gross income of $86,223 in computing the daily rate of $230.

Loss of future earnings

The defendant stated that compared with 1984, the firm's income had already dropped in 1985. He argued that the drop in 1986, was part of a trend. I would have thought that it was something quite natural that the income of a professional firm would fluctuate. I did not think it was realistic for anyone to say that a firm's income must rise year after year.

The basis of the plaintiff's claim under this head was for loss of earning capacity. Counsel for the defendant did not deny that there was such a loss. The physical disabilities suffered by the plaintiff were clearly described by Dr. Cheng and they are set out above. The plaintiff said that on account of the disabilities, his working capacity as a dental surgeon had been affected. He could not treat as many patients as before. He had become slower in his work. This evidence was not disputed.

The defendant argued that because of the partnership arrangement, the only adverse effect the disabilities had was that the plaintiff's rate of work was slower but this did not mean that he had lost patients and thus income. Before the Assistant Registrar, Counsel for the defendant made the following observation in his written submission:

> If at all the loss to the plaintiff is that it will now take him longer to earn the same amount of money, i.e., he is being kept out of his money (which as the evidence goes will eventually come his way) for some time. The claim, if any, would be for a sum representing this withholding of income i.e., interest.

I was unable to accept that contention. I would have thought that to a professional man time loss means money loss. The lesser the number of patients you see, or the lesser the number of operations you do, the less you earn: there being only so many working hours in a day. That should be obvious. It is not a question of being kept out of money. Time is lost for good and thus money. The fact that the plaintiff was in partnership with two others could not alter that fact. Furthermore, from February 1989, the partnership arrangement had been altered such that a partner's share of the income would depend on his collections. That this should come about should not at all be surprising as a partner whose performance (due to physical disabilities) was obviously not on par with the others should not continue to draw equal pay. He could not expect the others to carry him indefinitely. The extent of the plaintiff's disabilities was reasonably clear. It was an existing loss. One need only ask, what if the partnership were dissolved to realize that the loss to the plaintiff was real. In general a partnership could be dissolved at any time.

The issue of loss of earning capacity was addressed by Browne LJ in *Moeliker v. Reyrolle & Co.* [1977] 1 WLR 132 as follows:

> As I have said, this problem generally arises in cases where a plaintiff is in employment at the date of the trial. If he is then earning as much as he was earning before the accident and injury (as in the present case), or more, he has no claim for loss of future earnings. If he is earning less than he was earning before the accident, as in *Nicholls v. National Coal Board* [1976] 1 CR 266, he has a claim for loss of future earnings which is assessed on the ordinary multiplier/multiplicand basis. But in either case he may also have a claim, or an additional claim, for loss of earning capacity if he should ever lose his present job.

In *Underwood v. Ong Ah Long* [1986] 2 MLJ 246, a plastic surgeon suffered a permanent disability (termor of the left thumb) resulting in him being unable to use his left hand satisfactorily to perform major plastic surgery. The Privy Council awarded him both pre-trial loss and post-trial loss; and for the latter the Privy Council estimated the loss which the plaintiff would suffer and applied a multiplier of 6 years (the plaintiff there was then 52 years old).

Reverting to the present case, using the income earned for 1986, which worked out to $7,185 per month, the loss of $1,000 per month assessed by the Assistant Registrar (which is equivalent to about 14%) could not by any standard be considered excessive. Dr. Chang had stated that the left hand suffered a permanent disability of 30%. It would be come 40% in five years' time.A multiplier of 9 years which the Assistant Registrar applied was also in my view fair and reasonable considering that the plaintiff was only 39 years of age at the date of the assessment. He would in the normal course have another 21 years of working life left, if not more.

The defendant argued that in a case like this, a lump sum should be adequate - Counsel suggested $10,000. I felt that that would be grossly inadequate. It would be very unfair to the plaintiff. In my view the defendant grossly under-rated the adverse effect the disabilities of the thumb would have on plaintiff's practice as a dental surgeon It is common knowledge that the work of a dental surgeon is extremely delicate. He needs all his faculties to carry out his work efficiently. Reduced rate of work must necessarily mean reduced income.

As no ground was shown that the sums awarded for the two items stated above were wrong, I maintained the awards of the Assistant Registrar.

Cost of Future Operations

Lastly there remains a very minor item. Dr. Chang in his evidence envisaged that the plaintiff would have to go for an operation in 5 years' time when the pain in the joint of the left thumb would become intolerable. In his evidence Dr. Chang said that the operation at present cost $3,000. From the evidence it was not clear whether the figure he gave included hospitalizaton charges. The Assistant Registrar awarded a sum of $6,000 to cover cost of operation and antecedent pain. Even taking into account inflation and rising costs and the antecedent pain, I felt that doubling the estimate given by Dr. Chang did appear excessive. The defendant submitted that the Court should only award $3,000 I felt that a sum of $4,000 should be fair and adequate as payment would be made in advance. I reduced it accordingly.

Costs

On costs, as the defendant had succeeded only on the relatively small items and failed on the main items, I thought it was only just that he should pay half the costs of the appeal before me.

Also found at [1989] 2 CLJ 1292